

NO. PD-0498-17

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/14/2017
DEANA WILLIAMSON, CLERK

WILLIAM ROGERS
Appellant,
v.

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause Number 2013-4-5466
In the 24th Judicial District Court of Refugio County and
Cause Number 13-15-000600-CR
In the Court of Appeals for the Thirteenth Judicial District of Texas.

BRIEF FOR THE STATE

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ORAL ARGUMENT DENIED

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APPELLEE

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The Honorable “Skipper” Koetter
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NO. PD-0498-17

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS**

WILLIAM ROGERS,.....Appellant

v.

THE STATE OF TEXAS,.....Appellee

*** * * * ***

STATE’S BRIEF ON THE MERITS

*** * * * ***

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its District Attorney for Refugio County, and respectfully presents to this Court its brief on the merits in the named cause.

STATEMENT OF THE CASE

Appellant was charged by indictment on April 9, 2013 in Cause Number 2013-4-5466 with one count of Burglary of a Habitation with intent to commit the felony of aggravated assault and Burglary of a Habitation with attempt to commit or committed the felony of aggravated assault and one count of Burglary of a Habitation with intent to commit the felony of murder and Burglary of a Habitation with attempt to commit or committed the

felony of murder. [CR-8]. Appellant was also charged with one count of Aggravated Assault with a deadly weapon in Tr. Ct. Cause No. 2013-4-5468. [CR-8]. On April 17, 2013 the Appellant filed a motion to reduce bond. [CR-11-12]. A hearing was held on that motion to reduce bond on May 16, 2013. [Supp. RR-1-33]. Appellant testified that he did not intentionally shoot the victim. [Supp. RR-26]. On May 21, 2013 trial court, granted Appellant's motion to reduce bond. [CR-39; Supp. RR-32].

Appellant entered a plea of not guilty to both indictments on or about November 30, 2015. [RR-IX-7-8]. The jury rendered a guilty verdict on both indictments. [RR-XII-95-96]. After a punishment hearing on or about December 3, 2015, the jury assessed forty (40) years imprisonment in the Texas Department of Criminal Justice and twenty (20) years imprisonment in the Texas Department of Criminal Justice, respectively. [RR-XIII-38].

Thereafter, the trial court entered its order and Appellant timely filed its Notice of Appeal. [CR-298, 326]. The Thirteenth Court of Appeals (hereafter Court of Appeals) affirmed Appellant's conviction in Tr. Ct. Cause No. 2013-4-5466; Cause No. 13-15-0600 and vacated and dismissed the conviction in Tr. Ct. Cause No. 2013-4-5468; Cause No. 13-15-00601. *Rogers v. State*, 527 S.W.3d 329 Tex.App—Corpus Christi, 2017, pet. granted). Appellant's motion for rehearing was denied on or about April 9,

2017. Appellant was granted his petition for discretionary review, as to ground three only, on or about August 23, 2017. This Honorable Court of Criminal Appeals granted Appellant an extension for the filing of his brief on or about September 22, 2017. After requesting leave of court, Appellant filed his brief on or about October 12, 2017. The State filed its brief on or about November 13, 2017.

ISSUE PRESENTED

I. Did the Court of Appeals err in its assessment of, if error, there was not “some harm”?

STATEMENT OF THE FACTS

Uncontested facts show the Appellant, a convicted felon, while in an extramarital relationship with the victim’s wife, **Appellant entered the victim’s home with his own firearm, hid in the victim’s closet while the victim homeowner did not know Appellant was in the house, and Appellant fired the first shot, which struck the victim through his penis, testicle, and upper leg—with the victim’s own handgun** [RR-X-48; RR-XI-107, 170-173; RR-XII-95-96; State’s Exhibit 49].

Appellant admitted he parked his truck about one-half mile away from the house. [RR-XI-117, 205]. Yet, Appellant also testified that on February

14, 2013 he entered the victim's home with the permission of the victim's wife to feed the cats. [RR-XI-115, 118-19, 173, 204-05]. Yet, Appellant also admitted he carried his own .45 caliber firearm in his pants. [RR-XI-133, 204-5; State's Exhibit 50]. Appellant further admitted to being a convicted felon for willful cruelty resulting in a child's death [RR-X-122; RR-XI-107, 172-73; State's Exhibit 59]. When the victim returned home, Appellant claimed he knew the victim by sight as his girlfriend's husband. [RR-XI-122, 125]. Appellant said while he could have shot the victim with his .45 Sig Sauer, he instead attempted to exit the back door of the house and then a bedroom window but then decided to hide in the victim's closet. [RR-XI-124-127, 210-11].

Appellant seemingly attempted to infer that his reasonable belief to use deadly force while silently hiding in the homeowner victim's dark closet was because the victim was the initial aggressor, armed with a knife in a linebacker stance, who stated, "You!" in a booming voice, and "was coming in fairly quickly." [RR-XI-131-33]. The Appellant testified the victim's gun mysteriously or magically appeared on top of the gun safe in the closet. [RR-XI-182; State's Exhibit 49]. When the victim tried to reach for the gun, Appellant claimed he squeezed the trigger. [RR-XI-182]. According to the Appellant, although the victim had a gun safe in the living room, presumably

with shotguns, the victim armed himself with a knife instead. [RR-XI-182-83]. Appellant testified that despite seeing lots of blood, Appellant was not certain the victim had been shot [RR-XI-196]. Appellant further testified that after the victim disarmed the Appellant's initially fired handgun (which was actually the victim's .380 caliber handgun), Appellant drew his own .45 caliber Sig Sauer Model 1911 and from another location inside the victim's home fired at least one .45 round toward the victim "but did not aim for [the victim]." [RR-X-42-43; RR-XI-159-60, 184-85, 187, 192, 204; State's Exhibit 50]. Appellant elaborated, at that point, the victim had still not shot at him. [RR-XI-187,189].

In yet another attempt to infer a reasonable belief to use deadly force against a fleeing homeowner, Appellant testified he heard a "pop, pop, pop" after the victim fled through the front door of his own house. [RR-XI-161]. Under cross-examination, Appellant stated "it was more of an expression" and he only heard one "pop," then fired three more gunshots toward the victim outside the house.[RR-X-43-44; RR-XI-161, 191-92; State's Exhibits 7-9]. Appellant claimed he believed that the victim was attempting to shoot him on the front porch. [RR-XI-189]. Yet, Appellant further testified that his vision was so impaired that he could not see anything past 35 yards. [RR-XI-188-92]. Appellant then claims he stumbled on his exit from the front

porch, dropped his .45 Sig Sauer, fled to his vehicle, removed his shirt because it was heavy with sweat, and drove away . [RR-XI-161,199-201,212]. Per the Appellant’s testimony, Appellant failed to inform any investigators of any injuries sustained—no blood or injury to Appellant’s chest or abdomen regarding a “scratch” he supposedly received by the victim’s knife [RR-XI-207]. Appellant himself admitted he did not even notice the purported “scratch” while in jail for two weeks. [RR-XI-207]. Appellant further admitted that he was “not seriously injured.” [RR-XI-136, 213]. Appellant elaborated he did make a phone call while fleeing the scene, “[t]he concern that I had was my wife finding out about a relationship that I had been in for a year and eight months.” [RR-XI-195]. Appellant admitted he never called 911. [RR-XI-195].

Appellant self-servingly claimed that the victim was the initial aggressor with a knife, despite victim’s easy access to a shotgun in a living room gun cabinet, and Appellant mysteriously or magically found victim’s loaded handgun in the dark closet and pulled the trigger as the victim homeowner, reached for the gun. [RR-X-132-33; RR-XI-132, 182-83]. Appellant also testified he had no intent to commit any crime [RR-XI-169-170]. Previously, Appellant testified that he did not intentionally shoot the victim. [Supp. RR-26]. Appellant never testified that he lacked the victim’s

consent to be in the house, instead Appellant maintained he had consent to feed the cats from the victim's wife, who was not present at the time of the crime. [RR-XI-36, 71, 115, 118-119, 139-142, 204-05, 218-19].

Conversely, the victim testified that **while unarmed, he was shot in the groin by a man in the victim's bedroom closet and after the man shot at him again with a different firearm, the victim retreated to the safety of a neighbor's property.** [RR-X-34,40-43].

The victim testified that the Walther .380 caliber was the victim's, which was always stored in his nightstand—not the closet. [RR-X-132; RR-XI-178]. According to the victim, when he entered his own bedroom closet to change clothes after his workshift, Appellant shouted, “MF!” at the victim and then shot the victim in the groin and leg. [RR-X-30, 48; RR-XI-27, 134]. Victim testified that Appellant even told the victim that Appellant was robbing him, pointed the gun at the victim's head, and told the victim to get on his knees before the count of three. [RR-X-30-31]. During the subsequent struggle over the initial firearm, the victim testified he was able to later grab a knife from a living room cabinet. [RR-X-34; State's Exhibit 37]. The neighbor saw the victim “all bloodied up” “from his waist all the way to his feet” and contacted 911 authorities [RR-IX-18, 28; State's Exhibit 1]. Appellant fled the scene and was detained in a nearby county. [RR-X-

168,186,191-92]. Robbery remained an uncharged crime. Although unclear in the record, Appellant was found at the time of his arrest with a digital USB drive likely taken from the victim's home. [See RR-X-13, 30; Defendant's Exhibits 16-17; unadmitted State's Exhibit 57].

Neither necessity nor self-defense instructions were given to the jury. Jury sentenced Appellant to forty (40) years imprisonment in the Texas Department of Criminal Justice. [RR-XIII-38].

SUMMARY OF THE ARGUMENT

The defendant comes before the court in this case proposing a dramatic change to the cardinal rule in Texas that "a man's home is his castle." If the defendant is successful it will now be possible for bad actors to break into a man's home, hide in his closet, shoot the homeowner with the homeowner's own gun, shoot at the homeowner while he is fleeing for his life and then claim before a jury self-defense and necessity and have those issues submitted and considered by a jury. A patently absurd result and an extraordinary precedent.

Self-defense jury instruction was properly excluded where Appellant admitted he was engaging in criminal activity more serious than a traffic offense—unlawfully possessing multiple firearms with a prior felony

conviction. During a true Valentine's Day surprise, Appellant provoked the victim by hiding in his girlfriend's husband's closet with his own firearm, shooting the victim homeowner, and telling the victim he was conducting a robbery. The victim's force, if any, was *lawful and in his own home*. Appellant's near delusional and psychotic testimony shows he did not act with a reasonable belief. Appellant was not entitled to use deadly force pursuant to Sections 9.31 and 9.32, Texas Penal Code. Therefore, the Court of Appeals did not err as there was no error, nor some harm.

Necessity jury instruction was properly excluded where, Appellant provoked the victim, and Appellant did not fully admit he intentionally shot the victim, nor did Appellant affirmatively admit to the lack of consent of the victim—necessary elements in the charged felony conduct. Appellant's near delusional and psychotic testimony shows he did not act with a reasonable belief. Appellant was not acting as a reasonable, prudent, or ordinary man, the victim's force, if any, was *lawful and in his own home*, and Appellant was not justified for deadly force pursuant to Section 9.32, Texas Penal Code. Therefore, the Court of Appeals did not err as there was no error, nor some harm.

ARGUMENT

I. There was no error nor some harm when Appellant did not receive jury instruction of self-defense and trial court properly excluded based on prima facie evidence and Texas law.

Trial court properly excluded jury instructions of self-defense after trial court determined the Appellant was not entitled to said jury instructions. [RR-XI-139-142]. Evidence was before the trial court that Appellant was in the commission of several crimes, including the Appellant's admission of a prior felony conviction and possession of two firearms in the victim's house. Based on prima facie evidence—Appellant's own testimony—Appellant is not entitled to a jury instruction of self-defense. Even if this Honorable Court finds error otherwise, Appellant did not suffer "some harm."

In Texas, it is well-established law when the defendant starts the fight, he cannot turn around and claim that he was defending himself. TEX. PEN. CODE §§9.31(a)(2), 9.32(c)(West 2011); *Smith v. State*, 965 S.W.2d 509, 512-13 (Tex. Crim. App. 1998). One who wrongfully goes on the premises of another to take property without warrant of law, cannot claim to have acted in self-defense. *Yarborough v. State*, 66 Tex. Crim. 311, 312 (1912). Generally, person committing offense of robbery has no right to self-defense

against his intended victim. *Dillard v. State*, 931 S.W.2d 689, 697 (Tex.App—Dallas, 1996, pet. ref'd). Engaging in criminal activity more serious than a Class C traffic offense bars a defendant's self-defense claim. TEX. PEN. CODE §9.31(a)(2)(West 2011). The Court of Appeals has previously held evidence was sufficient to support rejection of self-defense where jury was free to disbelieve defense evidence; also there was evidence to support finding he did not act in self-defense: victim's testimony indicated defendant was the aggressor. *Madrigal v. State*, 347 S.W.3d 809, 818-19 (Tex. App.—Corpus Christi 2011, pet. ref'd). When the evidence establishes as a matter of law that force is not justified in self-defense, because, the defendant provoked the difficulty, then no self-defense issue is required. *Williams v. State*, 35 S.W.3d 783, 785-86 (Tex. App.—Beaumont 2001, pet. ref'd). Defendant who was *attempting to rob* victim when he killed him had no right of self-defense against victim even if victim was trying to shoot him. *Blackmon v. State*, 926 S.W.2d 399, 405 (Tex.App—Waco 1996, pet. ref'd)(emphasis added).

By firing the first shot, accused forfeited right of self-defense, and it was immaterial whether victim was armed when finally killed. *LaFarn v. State*, 159 Tex. Crim. 562, 565 (1954). If a person by his own wrongful act brings about the necessity of taking the life of another to prevent being

himself killed, he cannot say that such killing was in his necessary self-defense; but the killing will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or malice from which it was done. A person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself. *Gilleland v. State*, 44 Tex. 356 (1875); *Thuston v. State*, 21 Tex. App. 245, 248 (1891); *Koller v. State*, 36 Tex. Crim. 496, 500 (1897).

Here, Appellant provoked the victim and did not act reasonably by hiding in the victim's house and closet with two loaded firearms, especially when Appellant was a convicted felon—and Appellant attacked victim first. [RR-XI-131-33, 182-83] Victim testified that Appellant told the victim that he was robbing him, pointed the gun at the victim's head, and told the victim to get on his knees before the count of three. [RR-XI-30-31]. Other evidence arguably demonstrated that Appellant likely took a digital USB drive from the victim's house and possessed such during his arrest. [RR-X-13, 30; Defendant's Exhibits 16-17; unadmitted State's Exhibit 57]. Appellant, a convicted felon, testified he carried a firearm into the victim's house, which was not the Appellant's house. [RR-XI-133,204-5] Appellant was prohibited by law from possessing a firearm. State's Exhibit 59; See TEX. PEN. CODE §§9.31, 46.02; 46.04(West 2011). Even in the light most

favorable to the Appellant, the Appellant still fired two guns at the victim, in the victim's house during a knife fight. The victim's testimony about Appellant's attempted robbery and Appellant's admissions of deadly conduct and unlawfully possessing a firearm as a convicted felon do not entitle Appellant to receive a self-defense jury instruction.

Therefore, the trial court properly excluded the jury instruction of self-defense.

II. There was no error nor some harm when Appellant did not receive jury instruction of necessity and trial court properly excluded based on prima facie evidence and Texas law.

In order to raise necessity as a defense, defendant must admit violating the statute as charged and then offer necessity as a justification, which weighs against imposing a criminal punishment for the act or acts which violated the statute. *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999). [A]ppellant fails to acknowledge that each of these justification defenses requires that the defendant reasonably believe that his conduct is immediately necessary to avoid a greater harm. As with the statutory mistake-of-fact defense, a "reasonable belief" is one that would be held by an ordinary and prudent person, not by a paranoid psychotic." *Mays v. State*, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010). This Honorable Court

previously articulated that for the confession and avoidance doctrine to be established, the defendant must admit to the conduct, including the culpable mental state. *Juarez v. State*, 308 S.W.3d 398, 401-02 (Tex. Crim. App. 2010); See TEX. PEN. CODE §9.22(West 2011).

Texas law requires a two-prong test for a defendant to avail himself of the justification defense of necessity. See TEX. PEN. CODE §9.22 (West 2011). A defendant must present evidence that he reasonably believed a specific harm was imminent. *Davis v. State*, 490 S.W.3d 268, 275 (Tex.App.—Fort Worth 2016, pet. ref'd); See *Johnson v. State*, 650 S.W.2d 414, 416 (Tex.Crim.App.1983); *Brazelton v. State*, 947 S.W.2d 644, 648 (Tex.App.—Fort Worth 1997, no pet.). “Imminent” means something that is impending, not pending. *Davis* at 275 citing *Jackson v. State*, 50 S.W.3d 579, 595 (Tex.App.—Fort Worth 2001, pet. ref'd). Harm is imminent when there is an emergency situation and it is “immediately necessary” to avoid that harm. *Id.*

[A] defendant must present evidence that he reasonably believed the criminal conduct was immediately necessary to avoid the imminent harm. *Davis* at 275; See TEX. PEN. CODE §9.22(West 2011); *Brazelton* at 648. A “reasonable belief” is a belief that would be held by an ordinary and

prudent person in the same circumstances as the actor. *Davis* at 275 citing TEX. PEN. CODE §1.07(a)(42)(West 2011).

Generally, whether an accused's belief is reasonable is a question of fact and should be viewed from the accused's standpoint at the time he acted. *Davis* at 275 citing *Brazelton* at 648. The Court of Appeals has held that necessity requires the actor to reasonably believe the conduct is immediately necessary to avoid imminent harm and the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct. *Fox v. State*, No. 13-03-230-CR, 2006 WL 2521622 at 2 (Tex.App.—Corpus Christi Aug. 31, 2009)(mem. op., not designated for publication). The Court of Appeals further held that [e]vidence of a generalized fear of harm is not sufficient to raise the issue of imminent harm. *Id.*

When deadly force in self-defense is the conduct that is allegedly immediately necessary under section 9.22, Texas Penal Code, the defense of necessity does not apply. See *Butler v. State*, 663 S.W.2d 492, 496 Tex—App—Dallas, 1983; *aff'd* 736 S.W.2d 668 Tex. Crim. App. 1987; TEX. PEN. CODE §9.22(West 2011). Section 9.32, Texas Penal Code, demonstrates that an actor and his actions must be justified pursuant to

Section 9.31, Texas Penal Code; an actor may use deadly force in defense of person only if actor has a reasonable belief that deadly force is immediately necessary to protect against the other's unlawful deadly force; actor must be preventing the commission of an enumerated serious felony crime; actor cannot provoke the person; and actor cannot be engaged in serious criminal activity. TEX. PEN. CODE §9.32(West 2011).

Here, Appellant's claim that he could not escape the victim's house does not raise a "reasonable belief" that Appellant's actions were justified. Appellant claims he pulled the trigger as soon as victim grabbed Appellant's hand. [RR-XI-134]. Appellant magically and mysteriously found a loaded handgun in the dark closet, instead of using the Appellant's own firearm that Appellant admitted *was in his pant's pocket*. [RR-XI-133, 210-11] Moreover, Appellant failed to fully admit to all of the necessary elements in the indictment. [CR-8]. Throughout Appellant's testimony, Appellant stated he had no intent to commit a crime when he entered the house of David and Sandra Watson. [RR-XI-115, 169-70] Appellant claimed to have the consent of Sandra Watson to enter the habitation to feed her cats. [RR-XI-115, 118-19, 173, 204-5]. Even Appellant's counsel believed the issue of consent was so unproven an instructed verdict was requested to the trial court and referenced throughout closing argument to the jury.[RR-XI-36, 71,

115, 118-19, 139-42, 204-5, 218-19]. Appellant cannot benefit from a confession and avoidance justification defense when he did not fully admit to all of the conduct, including consent and intent.

By his own testimony, Appellant admitted he fired two guns during a knife fight [RR-XI-133-34, 187]. Appellant admitted his unintentional shot was the first shot fired. [RR-XI-196; Supp. RR-26]. Appellant testified the victim never shot at Appellant inside the house. [RR-XI-187,189]. Appellant testified victim exited the front door of his own house first. [RR-XI-160, 188]. Appellant claimed although he only heard one “pop” on the front porch; Appellant fired an additional three rounds “in [the victim’s] direction” outside the victim’s home. [RR-XI-187, 189,191-92]. Appellant was asked, “The knife is not in play anymore, you’ve shot Mr. Watson once with his own gun in his bedroom closet and now, without him returning fire, you’ve now shot at him a second – now you’ve shot at him another time with your own gun, correct?” [RR-XI-187]. Appellant admitted, “Yes, sir, I did.” [RR-XI-187]. Appellant further stated he was not seriously injured by a knife; he was only nicked, and it was so minor that he did not notice the scratch for two weeks. [RR-XI-207]. Section 9.32 does not entitle Appellant to receive a necessity justification defense instruction under these facts. TEX. PEN. CODE §9.32(West 2011). During a bond hearing on May 16,

2013, Appellant was asked, “You shot at him first?” [Supp. RR-26]. Appellant answered, “Not intentionally, and I didn’t know that I had hit him.” [Supp. RR-26]. Appellant was not entitled to use deadly force. Appellant admitted to deadly conduct and unlawfully possessing a firearm as a convicted felon and Appellant failed to confess to all of the charged elements. Even in the light most favorable to the Appellant, the Appellant still fired two guns at the victim, in the victim’s house during a knife fight. The Appellant’s steadfast position that he had permission from the victim’s wife to feed the cats and Appellant’s failure to admit he lacked the consent of the victim demonstrate that Appellant is not entitled to a jury instruction of necessity.

Therefore, trial court’s proper exclusion of the jury instruction for necessity should be affirmed and the Court of Appeals ruling of no harm should be affirmed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court affirm the judgment of the Court of Appeals and the trial court.

Respectfully submitted,

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**ATTORNEYS FOR THE APPELLEE,
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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, S.C.R. “Reid” Manning, Assistant District Attorney, Refugio County, Texas, certify that the number of words in Appellant’s Brief submitted on November 13, 2017, excluding those matters listed in Rule 9.4(i)(3) is 3,324.

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CERTIFICATE OF SERVICE

I, S.C.R. “Reid” Manning, Assistant District Attorney, Refugio County, Texas, certify that a copy of the foregoing brief was sent by electronic mail to Luis Martinez, P. O. Box 410, Victoria, Texas, 77902, Attorney for the Appellant, William Rogers, and by United States mail to Ms. Stacey Soule, P. O. Box 13046, Capitol Station, Austin, Texas 78711, State Prosecuting Attorney, on this the 13th day of November, 2017.

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